Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

EDWARD D. REIBMAN
108 North Eighth Street
Allentown, Pa. 18101

CRESSIE H. THIGPEN, JR.
Thigpen, Blue & Stephens
Suite 214
Hallmark Building
Raleigh, North Carolina 27601

JULIUS LEVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER*
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioners

*Counsel of Record

QUESTIONS PRESENTED

(1) Do Title VII and the Fourteenth Amendment permit a state to intentionally pay black employees less than white employees in the same job, so long as the original decision establishing that discriminatory wage differential was not itself the subject of a separate charge or action?

(2) Did the court of appeals err in holding that statistics may not be treated as probative evidence of discrimination unless the statistical analysis considers every conceivable non-racial variable?

(3) May a state satisfy its obligation to desegregate a de jure system by

adopting a freedom of choice plan that fails?

(4) May an employer immunize itself from liability for employment discrimination by delegating its employment decisions to a discriminatory third party?

(5) Did the court of appeals err in holding that this case should not be certified as a claim action?*

---

* The parties to this litigation are set forth at pp. iii-vi of the petition.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statement of the Case	6
Statement of the Facts	18
Summary of Argument	23
ARGUMENT	
I. Title VII and the Fourteenth Amendment Prohibit A Public Employer From Applying, As Well as Establishing, a Racially Based Salary System	23
(1) Salary Discrimination Is A Continuing Violation of the Equal Pay Act	25
(2) Neither Teamsters nor Evans Supports the Decision Below ..	32
(3) Salary Discrimination Is A Continuing Violation of the Fourteenth Amendment	40

		Page
II.	Petitioners Established the Existence of Post-1965 Intentional Salary Discrimination	45
	(1) Petitioners' Statistics Established a Prima Facie Case of Discrimination	47
	(2) Respondents Failed to Rebut That Prima Facie Case	60
III.	Title VII and the Fourteenth Amendment Place on Public Agencies a Non-Delegable Duty to Act in a Non-Discriminatory Manner	71
IV.	The Courts Below Erred in holding NCAES Had No Obligation to Disestablish a State Created System of Government Sponsored Single Race 4-H and Extension Homemaker Clubs	87
	(1) The History of the Clubs	87
	(2) The Applicable Legal Requirments	94

Page

V. The Courts Below Erred in Refusing to Certify this Case as a Class Action 99

CONCLUSION 110

APPENDIX: Statutes, Regulations, and Constitutional Provisions Involved 1a

TABLE OF AUTHORITIES

Cases	Page
Aooad v. Detroit Board of Education, 431 U.S. 209 (1977) ...	88
Adickes v. S. H. Kress Co., 398 U.S. 144 (1970)	79
Alston v. School Board of Norfolk, 112 F.2d 992 (4th Cir. 1940)	41
Arizona Governing Board v. Norris, 403 U.S. 1073 (1983)	21,76,79
Bell v. Georgia Dental Ass'n, 231 F.Supp. 299 (N.D. Ga. 1964)	82
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).....	79
Connecticut v. Teal, 457 U.S. 440 (1982)	56
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)..	18,19,25,26,28 30-31
County of Washington v. Gunther, 452 U.S. 161 (1981)	19,26,27
Craig v. Boren, 429 U.S. 190 (1976)	41,51
Craik v. Minnesota State University Bd., 731 F.2d 465 (8th Cir. 1984)	67,72

Page

Dothard v. Rawlinson, 433 U.S. 321 (1977) 20,49,62,64

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 22,107

Falcon v. General Telephone Co., 628 F.2d 369 (5th Cir. 1980) 70

General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982)..... 82-85

General Telephone Co. v. EEOC, 446 U.S. 318 (1980) 23,100-02

Green v. County School Bd., 391 U.S. 430 (1968) 42,97,98

Griffin v. County School Bd., 377 U.S. 218 (1964) 42

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 68,83

Guardians Association v. Civil Service Commission, 630 F.2d 79 (2d Cir. 1980) 64

Guinn v. United States, 238 U.S. 347 (1915) 43

Hazelwood School District v. United States, 433 U.S. 299 (1977) 16,56,58,60

Page

Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1978) 37

Lee v. Macon County, 267 F.Supp. 458 (M.D. Ala. 1966) 86

Lee v. Washington, 390 U.S. 333 (1968) 109

Mayor v. Educational Equality League, 415 U.S. 605 (1974)..... 56,58,60

Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962) 82

Movement for Opportunity v. General Motors, 622 F.2d 1235 (7th Cir. 1980) 70

Neal v. Delaware, 103 U.S. 370 (1890) 50,58,59

Norman v. Missouri Pacific Railroad, 414 F.2d 73 (8th Cir. 1969) 37

Patton v. Mississippi, 332 U.S. 463 (1947)..... 20,62

Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982) 55

Plessy v. Ferguson, 163 U.S. 537 (1895) 41

Page

schaver v. Rhodes, 416 U.S. 232 (1974) 88

Smith v. Allwright, 321 U.S. 649 (1944) 80

Strauder v. West Virginia, 100 U.S. 303 (1880) 42

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971) 42

Teamsters v. United States, 431 U.S. 324 (1977) 24,32-34,50,52, 55,60,75

Terry v. Adams, 345 U.S. 457 (1953) 81

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 54,67

Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 95

Trout v. Lehman, 702 F.2d 1044 (D.C. Cir. 1983) 65,70

Turner v. Fouche, 396 U.S. 346 (1970)..... 68

United Airlines v. Evans, 431 U.S. 533 (1977) 24,32-34

Page

United States v. SCRAP, 412 U.S. 669 (1973) 63

Vulcan Society v. Civil Service Comm'n, 490 F.2d 387 (2d Cir. 1973) 54

Wallace v. United States, 389 U.S. 215 (1967) 85

Washington v. Davis, 426 U.S. 229 (1976) 43

Williams v. New Orleans Steamship Ass'n, 673 F.2d 742 (5th Cir. 1982) 72

Statutes and Constitutional Provisions

Fourteenth Amendment, U.S. Constitution i,3,5,40-45,84

Fifteenth Amendment, U.S. Constitution 80

Civil Rights Act of 1964, Title VI 3,5,95,96

Civil Rights Act of 1964, Title VII ..... passim

Equal Pay Act, 28 U.S.C. §206(d)(1) 18,19,25-30,51

28 U.S.C. § 1254(1)..... 2

42 U.S.C. § 1981 82-84

	Page
42 U.S.C. § 2000e-2(~~a~~)	32
42 U.S.C. § 2000e-2(h)	27
Section 703(h), Title VII, Civil Rights Act of 1964 ...	33-34,39
Ore. Rev. Stat. § 137.350	37
Other Authorities	
7 C.F.R. § 15.3(b)(6)(i)	22,95-96
Rule 23, Federal Rules of Civil Procedure	22,102-03, 106-07
Rule 401, Federal Rules of Evidence	53
110 Cong. Rec. (1964)	28,30
H.R. Rep. 914, 88th Cong., 1st Sess. (1964)	36,53
"Perpetuation of Past Discrimination", 96 Harv. L. Rev. 828 (1983)	42,82

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 751 F.2d 662, and is set out at pp. 346a-481a of the Appendix to the Petition for Writ of Certiorari. The order denying rehearing, which is not reported, is set out at pp. 482a of that Appendix. The district court's memorandum of decision regarding class claims, dated October 9, 1979, which is not reported, is set out at J. App. 73-87. The district court's memorandum of decision of August 20, 1982, regarding class claims, which is not reported, is set out at pp. 3a-207a of the Petition Appendix. The district court's memorandum of decision regarding

individual claims, dated September 17, 1982, is set out at pp. 216a-345a of the Petition Appendix.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1984. A timely petition for rehearing and suggestion for rehearing en banc was denied by an evenly divided court on April 15, 1985. July 14, 1985, was a Sunday. The petition for writ of certiorari was filed on July 15, 1985, and was granted on November 12, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is an action seeking to redress racial discrimination in the operation of the North Carolina Argicultural Extension Service (NCAES).[1] NCAES is a federally

---

[1] The complaint named as defendants a number of specific NCAES officials as well as the counties which jointly operated the NCAES

funded state agency which provides assistance to farmers and others throughout North Carolina, and which organizes and assists the system of 4-H and extension homemaker clubs in the state. Petitioners filed this action in November 1971, alleging that NCAES had engaged in a variety of practices violating, inter alia, Title VI of the 1964 Civil Rights Act and the Fourteenth Amendment. Petitioners subsequently amended their complaint to include an allegation that NCAES had violated Title VII of the 1964 Civil Rights Act, as amended in 1972, by engaging in employment discrimination. Several federal officials were initially

---

program. For simplicity this brief refers to actions of all of these defendants as actions of NCAES; this use of terminology should not be understood to suggest that only the defendant agency, as such, was responsible for or involved in the disputed activities.

named as defendants in this action. In April, 1972, the United States intervened as a party-plaintiff, and the district court subsequently realigned the federal defendants as plaintiffs-intervenors.

The private plaintiffs filed several motions seeking certification of this case as a class action, and seeking to certify all the counties in North Carolina as a defendant class. Each of these motions was denied. The trial of this action focused on four distinct claims which remain in dispute. First, petitioners alleged that different base salaries established prior to 1965 for black and white workers in the same job had remained in effect, and that blacks hired before 1965 thus continued to be paid less than their white colleagues. Second, petitioners alleged that for more than a decade after 1965 respondents continued to

engage in intentional racial discrimination in compensation. Third, petitioners alleged that respondents had engaged in intentional racial discrimination in selecting the paid county chairman responsible for supervising the NCAES office in each county. Fourth, petitioners asserted that continued state assistance to several thousand single race 4-H and extension homemaker clubs violated both Title VI and the Fourteenth Amendment.[2]

The district court and a majority of the court of appeals rejected all of petitioners' claims. Judge Phillips

---

[2] In addition to these claims of systematic class wide discrimination, petitioners sought to prove the existence of discrimination against a number of specific individuals. The courts below, in rejecting those individuals claims, expressly premised those decisions on their view that there had been no systematic discrimination. Pet. App. 380a, 218a n.70 (sic).

dissented from the panel opinion, insisting that the denial of relief was error as a matter of law. A timely petition for rehearing and suggestion for rehearing en banc was denied by an equally divided court.

STATEMENT OF THE FACTS

Prior to 1965 NCAES was avowedly organized along strictly racial lines. There were separate black and white offices in every county, servicing exclusively black and white citizens respectively. NACES maintained separate wage systems for black and white employees, deliberately paying black workers less than similarly situated whites doing the same job.[3] Both courts below found that these racially based salary differentials continued well past 1971, the year

---

[3] Pet. App. 30a, 120a, 359a, 380a, 384a, 389a, 399a.

in which this action was filed,[4] and the court of appeals concluded that those disparities persist to this day.[5] NCAES' Director testified that the dual salary system had originally been established because there was less of a demand for black workers than for comparable whites:

> [Black home economics agents could be hired at a lower salary than white agents could. [B]lack agricultural agents could be hired and retained at a lower salary than white agricultural agents.[6]

---

4 Pet. App. 30a-31a, 122a-23a, 201a, 359a, 360.

5 The fourth circuit noted, "the Extension Service admits that, while it had made some adjustments to try to get rid of the salary disparity resulting on account of pre-Act discrimination, it has not made all the adjustments necessary to get rid of all of such disparity." Pet. App. 389a-90a.

6 C.A. App. 999. "C. A. App." refers to the court of appeals appendix. Because the underlying record is particularly voluminous and unwieldly, ten copies of the court of appeals appendix have been lodged with the clerk.

NCAES provided substantial material and other assistance to several thousand NCAES sponsored 4-H and extension homemaker clubs across the state; these clubs were organized along strictly racial lines, and NCAES employees who worked with these clubs were assigned on a racial basis. The NCAES operation in each county was overseen by a paid employee known as the county chairman. When this position was first created in 1962, NCAES expressly directed that it be given to the highest ranking white employee in each county. Every new chairman appointed between 1962 and 1965 was white.

The practice of fixing salaries or raises on the basis of race did not end in 1965. In 1971 the Director of NCAES wrote

a memorandum describing the specific reasons why race still affected salary decisions:

> Obviously one of the areas where we'd be checked on is salary.... Our salaries for women and non-white men on average are lower. Our figures verify. Due to several factors -
> -- The competitive market --This is not acceptable as a reason though.
> -- Tradition - not just in Ext[ension Service].
> -- Less county support for non-white positions.[7]

Petitioners demonstrated that NCAES consistently paid blacks lower salaries than were paid to whites holding the same positions. A direct comparison of the average salaries of blacks and whites working as associate agricultural agents, the single largest job title, revealed a persistent and substantial disparity:

---

[7] J. App. 129; C.A. App. 1606-07; see also J. App. 90-92.

Associate Agricultural Agents
1970-81[8]

Year	Average White Salary	Average Black Salary	Difference in Average Salary
1970	$ 9,876	$ 8,956	$ 920
1971	10,240	9,558	682
1973	10,292	9,797	495
1974	10,244	9,840	404
1976	12,711	11,885	826
1979	14,754	13,518	1,236
1980	15,253	14,485	768
1981	17,035	15,849	1,186

These disparities were particularly significant for two reasons. First, since associate agent is a lower level job, virtually all of the employees whose wages are reflected in this table were hired after 1965. Second, in every year the average tenure of black workers was greater than that of white workers holding

---

[8] Average salaries for individual years are set forth in C.A. App. 1562; GX 95; PX 50; PX 100; and GX 98.

the same position.[9] Petitioners offered data showing similar disparities in the average salaries paid to blacks and whites in other positions.[10] The accuracy of these calculations was not questioned by respondents or by either court below.

Both parties also offered evidence in the form of regression analyses, which calculated differences in the average salaries of blacks and whites who were not only in the same job, but also had the same education, tenure, and sex. Experts for both the government and NCAES utilized essentially identical statistical methods, and arrived at essentially similar results.

---

[9] See sources cited n. 8, supra.

[10] See sources cited n.8, supra; J. App. 128. In the case of associate home economics agents, the disparity rose from $358 in 1970 to $411 in 1981.

Salary Disparities:

Average Amount by which Salaries of Whites Exceeded Salaries of Blacks with Same Position, Education, Tenure and Sex

Year	Government Regression Analysis[11]	Defense Regression Analysis[12]
1974	$257-337	$364-381
1975	312-395	384-391
1981	158-248	310-415

Experts for both sides agreed that these salary disparities were statistically significant at least as late as 1975. (Pet. App. 117-119). In an effort to ascertain whether these disparities were

---

[11] Pet. App. 117a-119a, 444a; C.A. App. 399-418, 1568, 1601; GX 123 at 289, 297, 310 (for 1974); GX 124 at 33, 39, 48, 60 (for 1975); GX 122 at 37, 46, 55 (for 1981).

[12] Pet. App. 140a, 444-45a; C.A. App. 1681, 1693-1715; see also J. App. 159. For both analyses differences in each year depend on the order in which the variables were considered. These figures do not include adjustments for quartile ratings, which petitioners contended was a major method used by NCAES to discriminate in salaries.

due to performance ratings, the defense expert modified his analyses to compare black and white employees with the same ratings. That adjustment actually increased the demonstrated disparity in wages for 1975,[13] indicating that on average blacks were being paid less than whites even though NCAES believed the blacks were doing better work than whites.

The record also showed that the pre-1965 practice of naming only whites as county chairman continued with little change. Because of state requirements that county chairmen have extensive experience within NCAES, virtually the only individuals considered for or promoted to the position of county

---

[13] J. App. 445a; C.A. App. 1716.

chairman are full agents.[14] During the last two decades blacks have constituted approximately 25% of full agents.[15] Since 1963 the numbers of blacks and whites promoted to the position of county chairman were as follows:[16]

Period	White	Black	Percent Black
1962-1967	115	0	0%
1968-1975	51	1	1.7%
1976-1981	46	5	9.8%
1962-1981	212	6	2.6%

A number of facts regarding how this disparity came about are not in dispute. NCAES has never promoted a black to a

---

[14] Since 1972 all new county chairmen have previously served as full agents. C.A. App. 1755.

[15] GX 100; C.A. App. 1562.

[16] J. App. 127; GX 74; C.A.App. 1745. The names and race of each applicant and appointee from 1968 through May 1981 are set out in J. App. 114-26 and C.A. App. 1736-1742. The applicants are also listed in the chart following Pet. App. 419a in the court of appeals' opinion.

county chairmanship for which a white male also applied. In every instance in which a black and a white male applied for the position of county chairman, the white male was chosen.[17] There were only six blacks appointed county chairman during this 19 year period; in four instances only blacks had applied for the position,[18] and in the other two cases the only white applicants were women.[19] In the case of vacancies for which both black and white males applied, the number of black appointees, 0, is 4.5 standard deviations

---

[17] There were such 20 such vacancies. (C. A. App. 1736-40; chart following p. 419a of the Petition Appendix.)

[18] Carl Hodges (1971), B. T. McNeill (1976); Leroy James (1978) and Hoven Royals (1980). See C. A. App. 1736-40; chart following page 419a of the Petition Appendix.

[19] In 1979 L.C. Cooper was selected over Emily Ballinger. C.A. App. 1737. In 1981 Willie Featherstone was chosen over Ellen Willis. 751 F.2d 652, 678.

below the statistically expected number. In the case of vacancies applied for by blacks and either white males or white females, the number of standard deviations is 3.8.[20]

As a general rule NCAES selects a single applicant for promotion to county chairman; that name is then sent for approval to county officials, and almost invariably the counties accept NCAES' choice. (Pet. App. 78a). Prior to 1975, however, NCAES followed a different procedure when both blacks and whites applied for a vacancy; in such cases NCAES ordinarily approved two applicants, a black and a white, and sent both names to the county officials.[21] Where the final

---

[20] The standard deviations are calculated using the chi-square methodology of Hazelwood School District v. United States, 433 U.S. 299, 311 n.17 (1977).

[21] This occurred in over three-fourths of all such pre-1975 vacancies. See sources

decision was thus delegated to a county, the county always chose the white applicant. Beginning in 1975, NCAES followed a different practice, in all but one instance referring only a single name to the county involved.[22] In every case in which a black and a white male applied for a vacancy, and NCAES decided to select only a single applicant, NCAES chose the white applicant.

The only action taken by NCAES to modify the de jure systems of 4-H and extension homemaker clubs was to adopt a freedom of choice plan. That plan had, as Judge Philips noted in his dissenting opinion below, only a "minimal" effect. (Pet. App. 471a). On two occasions NCAES briefly adopted proposals for affirmative

---

cited, n.17, supra. In every instance it selected the white. Id.

[22] Id.

steps to disestablish this dual system; in both instances the proposal was rescinded at the request of NCAES' trial counsel, who warned that such efforts to integrate the 4-H extension clubs would "lower the standards for our program inasmuch as we will be forced to accept 4-H club members .. who may not have the ... talent to participate in club activities." (J. App. 157; C.A. App. 1904).

SUMMARY OF ARGUMENT

I. Title VII forbids an employer to base an employee's compensation on a racially motivated base wage or wage scale, regardless of whether that base wage or scale was established prior to 1965. Salary discrimination is a continuing violation of the Equal Pay Act, and pre-Act discriminatory salary differentials became illegal on the effective date of that Act. Corning Glass Works v.

Brennan, 417 U.S. 188 (1974). The standards of the Equal Pay Act are applicable to an equal-pay-for-equal-work claim under Title VII. County of Washington v. Gunther, 452 U.S. 161 (1981). In the instant case both courts below found that prior to 1965 NCAES set different base salaries for blacks and whites doing the same job, and that those salary differentials remained in effect until at least the mid-1970's.

II. Evidence of a disparity in the average salary of blacks and whites in the same job is sufficient to establish a prima facie case of salary discrimination. Such evidence establishes a prima facie case of salary discrimination under the Equal Pay Act, Corning Glass Works, 417 U.S. at 197, and the same standard applies under Title VII. Experts for both petitioners and respondents agreed there

were statistically significant disparities in the average salaries of blacks and whites with the same job, education and tenure. Petitioners were not obligated to demonstrate that no possible additional variable might have explained away those disparities. Dothard v. Rawlinson, 433 U.S. 321 (1977).

A defendant cannot rebut proof of such statistical disparities merely by hypothesizing that some non-racial factor might have explained these differences. A defendant must prove that the non-racial factor on which it relies would in fact account for the proven disparities. Patton v. Mississippi, 332 U.S. 463 (1947). Respondents made no effort to meet that burden, but merely offered speculation that the salary disparities might have had a legitimate non-racial cause.

III. An employer cannot escape its responsibilities under Title VII by delegating employment decisions to a third party. Arizona Governing Board v. Norris, 403 U.S. 1073 (1983). In this case NCAES has never promoted a black to the position of a county chairman if a white male also applied for the vacancy. The court of appeals erred in holding that this practice could be defended by evidence that NCAES frequently permitted county officials to decide whom NCAES would promote.

IV. Prior to 1965 NCAES established a de jure system of separate black and white 4-H and extension homemaker clubs. In 1965 NCAES adopted a freedom of choice plan that failed; the number of single race clubs today is virtually the same as it was 20 years ago. Respondents' failure to disestablish this dual system violates

the applicable federal regulations. 7 C.F.R. § 15.3 (b)(6)(i). Petitioners also offered substantial evidence indicating that members of these clubs continue to be recruited on a racial basis. The lower courts erred in failing to resolve the latter claim.

V. The fourth circuit held that class certification was inappropriate because petitioners had not demonstrated that the proposed class was injured by any "legally cognizable wrong." There were of course statewide NCAES practices of which petitioners complained; the fourth circuit, holding that those practices were lawful, concluded that the case thus presented no "legally cognizable wrongs." The court of appeals erred in basing certification on its view of the merits of the claims involved. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

The district court believed that class certification was impermissible because the United States had filed a pattern and practice action raising similar issues. That decision was inconsistent with the intent of Congress to provide overlapping private and governmental remedies for violations of Title VII. General Telephone Co. v. EEOC, 446 U.S. 318 (1980).

ARGUMENT

I. TITLE VII AND THE FOURTEENTH AMENDMENT PROHIBIT A PUBLIC EMPLOYER FROM APPLYING, AS WELL AS ESTABLISHING, A RACIALLY BASED SALARY SYSTEM

Both courts below found that the wage rates of blacks hired prior to 1965 had for racial reasons been set at levels lower than the salaries of comparable whites, and that these racially based wage disparities continued until at least the

mid-1970's. (See pp. 6-7, supra). The court of appeals, however, held that only the establishment of such a racially tainted wage system, but not the actual utilization of that system, constituted discrimination. (Pet. App. 380a-82a) Because the base wages of petitioners such as Bazemore were established prior to 1965, while the instant action was only commenced in 1971, the fourth circuit reasoned that NCAES was entitled to continue indefinitely paying petitioners lower salaries than the wages paid to their comparable white colleagues. The court of appeals believed that this result was compelled by this Court's decisions in Teamsters v. United States, 431 U.S. 324 (1977) and United Airlines v. Evans, 431 U.S. 533 (1977). The fourth circuit's decision conflicted with the opinions of seven other circuits, which have held that

salary discrimination is a continuing violation of Title VII. See cases cited, Petition, pp. 17-22.

(1) Salary Discrimination Is A Contining Violation of the Equal Pay Act

The question of whether salary discrimination constitutes a continuing violation of Title VII is, we urge, controlled by this Court's construction of the related provisions of the Equal Pay Act of 1963. In Corning Glass Works v. Brennan, 417 U.S. 188 (1974) this Court held that salary discrimination is a continuing violation of the Equal Pay Act, and that that Act thus forbids an employer to continue to use discriminatory pre-Act salary scales. In Corning Glass male workers hired prior to 1964 had been given higher base salaries than women doing the same work. The Court explained:

> The differential ... reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

417 U.S. at 205. (Emphasis added).[23] The decision in Corning Glass is, for several reasons dispositive of the same issue under Title VII.

First, in County of Washington v. Gunther, 452 U.S. 161 (1981), every member of this Court agreed that the substantive standards of the Equal Pay Act should apply to an action under Title VII alleging a denial of equal compensation

---

[23] See also id. at 208 ("If ... the work performed by women on the day shift was equal to that performed by men on the night shift, the company became obligated to pay the women the same base wage as their male counterparts on the effective date of the Act.")(Emphasis added)

for equal work. The Equal Pay Act, adopted in 1963, requires covered employers to give women the same salaries paid to men doing the same work. 29 U.S.C. §206(d)(1). The Equal Pay Act authorizes an employer to utilize certain salary differentials, and the Bennett Amendment to Title VII, 42 U.S.C. §2000e-2(h), extends that authorization to Title VII claims of salary discrimination against women. Although the Court in Gunther was sharply divided as to the meaning of the Bennett Amendment, both the majority opinion[24] and the dissenters[25] agreed that the substantive standards of the Equal Pay Act would be applied to an equal-pay-for-equal-work claim under Title VII. Both

---

[24] 452 U.S. at 175 ("The Bennett Amendment clarified that the standards of the Equal Pay Act would govern ... Title VII ....").

[25] 452 U.S. at 190, 191-2, 200-01.

opinions emphasized that Senator Clark, the floor manager of Title VII, had explained to his colleagues that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII"[26] If, as this Court has already held in Corning Glass, the use of discriminatory pre-Act base wages violates the Equal Pay Act, the continued use of such base wages is also a violation of Title VII.

Second, if salary discrimination were treated as a continuing violation of the Equal Pay Act, but not of Title VII, a number of anomalies would result. If, prior to 1963, a white woman and a black man were both being paid less than a white

---

[26] 452 U.S. at 172 n.12 (majority opinion), 192 (dissenting opinion). The quoted statement appears at 110 Cong. Rec. 7217 (1964).

man doing the same work, Corning Glass gives the woman a right to have her salary raised to the level of the white man, whereas under the fourth circuit decision the black man could be paid an inferior salary for the rest of his life. Similarly, although under the Equal Pay Act a female worker can challenge at any time a discriminatory pay differential established after 1965, a black worker, under the fourth circuit decision, must file an EEOC charge within 180 days of the creation of that differential, or be forever barred from redressing that discrimination. Nothing in the legislative history of Title VII suggests that Congress could have intended to thus provide blacks with more limited protections against salary discrimination than was already enjoyed by women under the Equal Pay Act. Those members of Congress

who successfully urged that Title VII extend to sex discrimination expressly disavowed any intention to confer upon women any greater rights or remedies than would be enjoyed by blacks.[27]

Third, the decision in Corning Glass accurately reflects the ongoing nature of salary determinations, and thus of salary discrimination. Hiring and promotion decisions may often be discreet, isolated and generally final actions, but the salaries paid to particular individuals, and for specific jobs, are ordinarily under continuous, or at least repeated, review. The legislative history of the Equal Pay Act highlighted the systematic manner in which American industry fixes

---

[27] 110 Cong. Rec. 2581 (Rep. St. George) (Women "do not want special privileges); 2583 (Rep. Kelly) (urging that "all persons, men and women, possess the same rights"); 2584 (Rep. Watson) ("equal rights for all people").

the salaries for positions and individuals, generally focusing on four specific factors, skill, effort, responsibility and working conditions. Corning Glass Works v. Brennan, 417 U.S. at 199-202. Where an employer had for racial or sexist reasons set an inappropriately low salary for an individual or position, application of these "well defined and well-accepted" industry principles should ordinarily lead to a correction of that discrimination. 417 U.S. at 201. Congress understandably regarded as culpable an employer that, ignoring the generally accepted practice of job evaluation, persisted in applying pre-Act salary differentials rooted in discrimination. That culpability is the same whether the discrimination at issue was on the basis of sex or of race.

(2) Neither Teamsters nor Evans Support the Decision Below

Teamsters and Evans provide no basis for the decision of the fourth circuit. Both courts below found that NCAES was knowingly paying black workers less than white workers doing precisely the same job, relying on racially discriminatory base wage rates established prior to the effective date of Title VII. Such a practice clearly falls within the literal language of Title VII, which forbids an employer "to discriminate against an individual with respect to his compensation ... because of such individual's race." 42 U.S.C. § 2000e-2(a). Teamsters v. United States expressly held that as a general matter Title VII forbids the utilization of practices which operate to perpetuate the effects of pre-Act discrimination:

> Congress "procsribe[d] .. practices that are fair in form, but discriminatory in operation" ... One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination. As the Court held in Griggs [v. Duke Power Co]: "Under the Act, practices ... neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory practices." 431 U.S. at 349.

The continued use of a racially explicit base wage has precisely such a forbidden consequence.

In Teamsters this Court held that the use of a seniority system that perpetuated the effects of past discrimination would have violated Title VII "[w]ere it not for § 703(h)." 431 U.S. at 350. Both Teamsters and Evans relied on the terms of section 703(h), which expressly permits the utilization of a bona fide seniority system "[n]otwithstanding any other provision of [Title VII]." It was because

of just such a bona fide seniority system that blacks had been denied the promotions sought in Teamsters, and that the plaintiff had been denied the additional wages sought in Evans. In rejecting the seniority-related claims in those cases, the Court described section 703(h) as conferring "immunity" on bona fide seniority systems, 431 U.S. at 350, a term which made clear that section 703(h) created an exception to the general Title VII prohibition against practices perpetuating the effects of earlier discrimination. The result in Teamsters and Evans thus turned on the particular favored treatment for seniority systems that was demanded during the debates on Title VII and that was embodied in the language of section 703(h).

Nothing in the terms or legislative history of Title VII reflects any comparable desire to immunize racially motivated pre-Act salary systems or base wages, should those systems or wages continued to be utilized after the effective date of Title VII. If an employer, prior to 1965,[28] had been paying blacks less than whites for doing identical work, the literal language of the statute required that those salaries be adjusted to the same level when Title VII became effective on July 1, 1965. The proponents of Title VII noted with grave concern the different

---

[28] Since this is an action against a state agency, the relevant effective date of Title VII is March 24, 1972, the effective date of the1972 amendments extending the coverage of that statute to state and local governments. The fourth circuit assumed, as do we, that the issue in this case, whether pre-1972 state salary systems are actionable under Title VII, turns on whether Title VII, as originally enacted, required alteration of pre-Act private employer salary differentials.

median salaries of blacks and whites, emphasizing that this disparity placed "an entire segment of our society ... into a condition of marginal existence."[29] Aware, as they were, that blacks were being paid less than whites for performing the same jobs, it is inconceivable that the Congress which adopted Title VII intended to freeze an entire generation of blacks into that position of inequality, or to provide equal pay for equal work only for blacks whose base salaries were established after July 1, 1965.

The decision of the fourth circuit entails consequences inconsistent in a variety of ways with other aspects of Title VII. Title VII forbids an employer to intentionally assign a lower wage to a

---

[29] H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, 28 (additional views of Reps. McCulloch, et al.)(1964)

particular position because most or all of the employees in that position are black or female. See County of Washington v. Gunther, 452 U.S. 161 (1981). But such discriminatory wage systems ordinarily were established, as was the case in Gunther,[30] long prior to the adoption of Title VII or the beginning of the limitations period that would be relevant to a constitutional claim.[31] If, as the fourth circuit has held, only the creation of such discriminatory wage scales, but not their application, is unlawful, then

---

[30] The existence of separate position for female prison guards dated from prior to 1955. See note at Ore. Rev. Stat. § 137.350.

[31] See, e.g. Norman v. Missouri Pacific Railroad, 414 F.2d 73, 84-85 (8th Cir. 1969) (system established in 1930's); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 437-38 (D.C. Cir. 1978) (system established in 1947).

Gunther and the principle it establishes would be a dead letter.

The decision below would also emasculate the statutory and constitutional prohibitions against racial discrimination in the fixing of salaries for particular employees. Unlike discrimination in promotions or assignments, the effects of which are often obvious to all involved, the existence of discrimination in compensation is only rarely apparent, since the victims of that practice usually do not know the salaries of their white colleagues, and ordinarily have no method of comparing their wages with those of others doing the same work. In a substantial proportion of all reported Title VII wage compensation cases,[32] the plaintiffs were not able to detect that

---

[32] See cases cited, Petition, pp. 17-22.

statutory violation until long after the deadline for filing a charge with regard to the intial act establishing their salaries.

The decision of the fourth circuit affords to salary scales a degree of protection far greater than that which Title VII provides even for seniority systems. To justify salary disparities under section 703(h), a defendant must prove both that those disparities were the result of seniority system, and that the system itself was bona fide; if defendant failed to establish that both the creation and maintenance of a seniority system were untainted by a discriminatory purpose, the affirmative defense authorized by section 703(h) would be unavailable. The fourth circuit decision regarding salaries would create a far more sweeping defense, holding that wage disparities caused by

pre-Act salary scales are unlawful regardless of whether those scales were in fact racially motivated. Thus pre-Act salary scales would enjoy a far greater degree of protection than pre-Act seniority systems, even though only seniority systems are afforded any degree of immunity under the actual language of Title VII. There is no reason to believe that the framers of Title VII intended any such incongruous result.

(3) Salary Discrimination Is a Continuing Violation of the Fourteenth Amendment

The fourth circuit rejected without explanation petitioners' claim that the utilization of racially tainted base wages violated the Fourteenth Amendment. Although those wage scales pre-dated Title VII and thus were not when established violative of that statute, those scales

were at all times unconstitutional under the Fourteenth Amendment. Even Plessy v. Ferguson, 163 U.S. 537 (1895), condemned such unequal treatment, and the fourth circuit itself expressly forbade salary discrimination by state agencies as early as 1940. Alston v. School Board of Norfolk, 112 F.2d 992 (4th Cir. 1940), cert. denied 311 U.S. 693 (1940). The disposition of petitioners' constitutional claim is necessary since, if sustained, that claim would entitle them to back pay for a period commencing in 1968, whereas the back pay period for their Title VII claim begins March 14, 1972, the effective date of the 1972 amendments.

Corning Glass recognized that the use of discriminatory base wages constituted a present violation of the Equal Pay Act because it "operated to perpetuate the effects of the company's prior illegal

practice of paying women less than men for equal work." 417 U.S. at 209-10. For over a century, and in a variety of circumstances, this Court has condemned as unconstitutional actions which perpetuate the effect of prior intentional racial discrimination.[33] See "Perpetuation of Past Discrimination", 96 Harv. L. Rev. 828 (1983). Although an equal protection claim requires proof of a discriminatory motive, it is not necessary that that motive and the injury complained of be contemporaneous, so long as the injury can be "ultimately ... traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976). The most egregious devices that perpetuated past

---

[33] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 21 (1971); Green v. County School Bd., 391 U.S. 430, 438 (1968); Griffin v. County School Bd., 377 U.S. 218, 232 (1964); Strauder v. West Virginia, 100 U.S. 303, 306 (1880).

discrimination were the infamous grandfather clauses, which based a citizen's right to vote on whether his or her ancestors had been eligible to vote prior to the adoption of the Fifteenth Amendment. This Court struck down those clauses because they made racial criteria in effect before the Civil War "the controlling and dominant test of the right of suffrage" more than half a century later. Guinn v. United States, 238 U.S. 347, 364-65 (1915).

In the instant case NCAES' racially explicit pre-1965 salary decisions were literally "the controlling and dominant test" for ascertaining what salary pe-titioners would be paid in the years that followed. If the North Carolina legislature had in 1964 fixed petitioner Bazemore's salary by statute, intentionally setting it at a lower level because

of his race, this Court would not hesitate to declare unconstitutional the continued enforcement of such a law. Surely the result is no different where, as here, the racially motivated state practice complained of was taken pursuant to an administrative decision rather than a state statute. Similarly, if a state agency in 1900 had established salary scales for specific jobs based on the race of the employees holding those positions, the fourth circuit would hold that that decision was only actionable at the beginning of the century; the applicable limitations period, on this view, would expire decades before present black employees were hired or even born. Such a construction of the Fourteenth Amendment would read into the Constitution itself the very evil condemned in the grandfather clause cases.

The factual findings of the courts below that racially motivated pre-1965 salary disparities continued until at least the mid 1970's thus compels the conclusion that respondents violated both Title VII and the Fourteenth Amendment. The burden is on the respondents to establish the date on which the continuing effects of those salary disparities finally ended. This claim should be remanded to the trial court for appropriate proceedings to determine the amount of back pay awarded, and to fashion any necessary injunctive relief.

II. PETITIONERS ESTABLISHED THE EXISTENCE OF POST-1965 INTENTIONAL SALARY DISCRIMINATION

Petitioners claimed and sought to prove at trial that the practice of intentional salary discrimination did not end in 1965, but continued for more than a

decade thereafter. Petitioners offered undisputed evidence that, even among individuals hired after 1965, the average salary of black workers was consistently lower than the average salary of whites holdng the same position and with the same education and tenure. (See pp.9-13, supra).

Both courts below, however, regarded this evidence as fatally defective. (Pet. App. 141a, 389a-91a) Neither the district judge nor a majority of the fourth circuit panel thought it particularly surprising or significant that for years blacks had been paid less than whites for doing the same job. Even though petitioners had shown a substantial and persistent disparity in the wages paid to blacks and whites in the same job, the courts below held that petitioners were legally obligated to demonstrate that

there was no possible legitimate explanation for those disparities. Respondents never offered any evidence demonstrating that consideration of additional variables would in fact have eliminated the apparent salary disparities, and both courts below held that such evidence was entirely unnecessary. The court of appeals and district court relied on somewhat different lines of reasoning in reaching this conclusion.

(1) Petitioners' Statistics Established A Prima Facie Case of Discrimination

The fourth circuit concluded that the statistical analyses offered by petitioners were entirely "unacceptable as evidence of discrimination" (Pet. App. 391). Evidence that whites make more than blacks for doing the same job, the appellate court insisted, is entitled to

no weight whatsoever as proof of salary discrimination. On the court of appeals' view, the statistics in this case did not even meet the minimal standard necessary to establish a prima facie case, and the defendants were thus under no obligation to offer any defense at all to that evidence. Unless a plaintiff demonstrated that no conceivable additional factor could explain away a statistical disparity, the court of appeals held that evidence that blacks are paid, hired, or promoted or given raises less often than whites would be devoid of weight or significance.[34]

---

[34] The majority opinion rejected the individual claims of salary discrimination on a similar theory. Petitioners offered statistical comparisons of their wages with the wages of white agents with the same education tenure, job title and county. The majority dismissed that evidence on the ground that such comparisons did not also consider possible additional job qualifications or differences in job performance. (Pet. App.

The Court has repeatedly rejected similar arguments that statistical evidence must be absolutely conclusive in order to be probative. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the plaintiffs relied on population statistics to show that an employer's hiring criteria had an adverse impact on women. The defendant argued that the plaintiffs should have been required to demonstrate the impact of those criteria on actual applicants. This Court disagreed, explaining, "The plaintiffs in a case such as this are not required to exhaust every

---

378a, 379a). Both the majority and Judge Phillips agreed that the district court's decision rejecting the individual claims would have to be reversed if there was proof of a pattern and practice of salary discrimination. (Pet. App. 380a, 467a). The district court acknowledged that its disposition of the individual claims turned on its view that there was no systematic salary discrimination. Pet. App. 218a n.70 [sic.]

possible source of evidence." 431 U.S. at 331. In Teamsters v. United States, 431 U.S. 321 (1977), the employers objected in a similar way to evidence that it employed a far smaller proportion of minorities than were present in the population. The employer insisted that half a dozen factors not considered in the plaintiff's analysis might have explained away that disparity, and presented an expert on statistics to criticize the plaintiff's methodology.[35] But this Court held that the plaintiff itself was under no obligation to "fine tun[e]" its statistics. 431 U.S. at 342 n. 23. See also Neal v. Delaware, 103 U.S. 370, 395 (1890).

In a case such as this in which petitioners allege they are not being given equal pay for equal work, the

---

[35] See Brief for Petitioner T.I.M.E.-D.C., Inc., pp. 18-20.

allocation of the burden of proof should be the same as is applied under the Equal Pay Act. In an Equal Pay Act case, once a plaintiff has met her burden of "showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified". Corning Glass Works v. Brennan, 417 U.S. 188, 197 (1974). A demonstrable disparity in the average salary paid women and men in the same job would be sufficient to satisfy a plaintiff's burden under Corning Glass. Since the substantive standard of the Equal Pay Act and Title VII are the same in an equal-pay-for-equal-work case, that same evidence, adduced here to demonstrate the existence of racial discrimination, was also sufficient to meet plaintiffs' burden.

The same standard is entirely appropriate in a Title VII case. Here, as in Teamsters "it is ordinarily to be expected that nondiscriminatory" salary policies will result in comparable salaries for blacks and whites whom an employer itself has classified in the same position. 431 U.S. at 339 n.20. The legislative history of Title VII, moreover, demonstrates, that the Congress adopted that measure because it believed the existence of nationwide racial discrimination was established by statistics demonstrating substantial differences in the median salaries of black and white workers.[36]

The court of appeals apparently believed that statistics could be treated

---

[36] H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, 28 (additional views of Reps. McCulloch, et al.) (1964).

as reliable evidence only if the analysis was so refined as to rule out any plausible non-racial explanation for a demonstrated disparity. But statistical evidence need not be conclusive in order to be admissible or relevant; rather, statistical evidence, like other types of proof, need only have a "tendency to make the existence of [discrimination] ... more likely...." Fed. Rules of Ev., Rule 401. Statistical evidence which meets that standard is not, unless unrebutted, dispositive by itself of the litigation; such evidence merely shifts to the defendant the burden of adducing evidence that the disparity was caused by the application of a legitimate non-discriminatory criterion. Cf. Texas Department of

Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); Vulcan Society v. Civil Service Comm'n, 490 F.2d 387, 392 (2d Cir. 1973).

In order to provide probative statistical evidence that a challenged selection procedure is being applied in a discriminatory manner, a plaintiff must (a) identify the procedure in dispute, (b) identify the group of applicants or employees to whom that procedure is applied,[37] and (c) demonstrate a disparity

---

[37] In a case where a plaintiff challenges only a selection procedure for hiring or promotions, the appropriate universe for comparison purposes is the group of applicants. Because applicant flow data is often unavailable or unreliable, the courts have properly accepted workforce statistics as evidence of the composition of the applicant group. See, e.g., Teamsters, 431 U.S. at 337 n.7. In an action regarding internal promotions, the relevant workforce, of course, is the group of employees eligible for promotion. Paxton v. Union National Bank, 688 F.2d 552, 564 (8th Cir. 1982) Where a plaintiff alleges that applicant flow is tainted by racial discrimination, the

between the racial composition of that initial group and the group ultimately selected, e.g., for hiring, promotions, cases, or jury service. The appropriate degree of statistical refinement will thus turn on the specific nature of a plaintiff's claims. Where a defendant's selection process involves a number of different factors or procedures, a plaintiff may either challenge the process as a whole, as occurred in this case, or focus his or her objection on only a specific aspect of that process. Connecticut v. Teal, 457 U.S. 440 (1982).

In Hazelwood School District v. United States, 433 U.S. 299 (1977), the government alleged there was intentional discrimination in the manner in which

---

composition of the applicant group should be compared with that of the relevant workforce.

Hazelwood selected new teachers from the area pool of teachers. Because the United States did not attack Hazelwood's practice of considering only trained educators, it was that pool of trained educators, rather than the entire population, whose composition was compared with Hazelwood's hiring rate. 433 U.S. at 308-312. In Mayor v. Educational Equality League, 415 U.S. 605 (1974), where the plaintiffs alleged intentional discrimination in the selection of members of an Educational Nominating Panel, the city charter required the mayor to chose most of those members from among individuals who headed certain public and civic organizations. The plaintiffs did not attack the legality or legitimacy of this city charter requirement 415 U.S. at 620. Under those circumstances the Court held that "the relevant universe for comparison purposes

consists of the highest ranking officers of organizations and institutions specified in the city charter, not the population at large," 415 U.S. at 620-21. An asserted qualification requirement may be used to narrow the universe for comparison only if a plaintiff challenges neither the legitimacy of that requirement nor the manner in which it was applied. As a practical matter it will at times be difficult to calculate a universe of compa son which matches exactly the group to which a challenged procedure applies. Evidence regarding the composition of that group need not be conclusive; a defendant is free to offer more refined data which it believes better approximates the composition at that group.

Neither Hazelwood nor Educational Equality League, however, suggested that the plaintiffs in such cases were obli-

gated to buttress such statistics with evidence foreclosing the possibility that potential black appointees were less qualified than the whites selected. In Neal v. Delaware the lower court had assumed, in the absence of evidence to the contrary, that "the great body of black men residing in th[e] state are utterly unqualified by want of intelligence, experience or moral integrity, to sit on juries" 103 U.S. at 394. This Court refused to indulge in any such "violent assumption." 103 U.S. at 397. Neal forbade federal as well as state courts from requiring a plaintiff, as part of his or her statistical analysis, to overcome any presumption that blacks are ordinarily less skilled and capable than whites. Both Title VII and the Fourteenth Amendment forbid a public agency to rely on any such assumption in making employment decisions;

surely it is equally improper for a federal court, in resolving an employment discrimination claim, to rely on that very impermissible assumption of racial differences.[38]

In the instant case the challenged practice was the fixing of initial salaries and raises for employees holding the same position. Accordingly, the "relevant universe for comparison purposes" was all employees in the same job. The average salaries of black and white workers represented the cumulative effect of such disputed salary decisions regarding each of those employees. The resulting statistical analyses were as complete as those deemed acceptable in Teamsters,

---

[38] The district judge's decision in the instant case relies in part on precisely such an assumption, arguing at length it was "common knowledge" that black college graduates were in general less educated than whites. (Pet. App. 196a-98a).

Hazelwood and Educational Equality League, and were clearly sufficient to establish a prima facie case of salary discrimination.

(2) Respondents Failed to Rebut That Prima Facie Case

The district court acknowledged that petitioners' statistical evidence was both probative and sufficient to create a prima facie case, but held that that evidence had been rebutted by respondents. (Pet. App. 130a-31a, 149a-50a) Respondents, however, did not offer statistical evidence demonstrating that the proven disparities were the result of racially neutral job related criteria for fixing or raising salaries. On the contrary, the statistics offered by respondents revealed essentially the same disparities proven by petitioners. The "defense" accepted by the trial court consisted merely of testimony that there were 9 nonracial

factors which had not been included in the statistical analyses offered by either party. (Pet. App. 133a-36a) Respondents did not offer, and the trial court regarded as entirely unnecessary, evidence that inclusion of these additional variables would in fact have eliminated the apparent disparities. On the trial court's view a defendant could conclusively rebut significant statistical evidence of racial disparities simply by offering speculation that the inclusion of other variables might have yielded a different result.

This Court has repeatedly held that such unsubstantiated speculation is entitled to no weight in rebutting a prima facie case of discrimination. In Patton v. Mississippi, 332 U.S. 463 (1947), the state suggested that the paucity of black jurors might have been due to a lack of

qualifications among black citizens. This Court observed "[I]f it can possibly be conceived that all of them were disqualified for jury service ..., we do not doubt that the State could have proved it." 332 U.S. at 469. (Emphasis added) The state's mere speculation that blacks were unqualified "wholly failed to meet" the statistical evidence offered by Patton. Id. In Dothard v. Rawlinson this Court again held that a defendant had to do more in response to such statistical evidence than merely hypothesize the existence of possible explanations. "If the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own. In this case no such effort was made." 433 U.S. at 331. These decisions make clear that a defendant who wishes to rebut a prima facie case must offer

substantial evidence, not merely "an ingenious academic exercise in the conceivable." United States v. SCRAP, 412 U.S. 669, 688 (1973).

As Judge Phillips emphasized in his dissenting opinion in this case, the effective use of statistical evidence in a discrimination case would be impossible if such evidence could be rebutted merely by testimony that the statistical analysis did not

> include a number of other independent variables merely hypothesized by defendants .... [T]o apply such a rule generally would effectively destroy the ability to establish any Title VII pattern or practice claim by this means of proof. [I]t will always be possible for Title VII defendants to hypothesize yet another variable that might theoretically reduce a race-effect coefficient demonstrated by any multiple regression analysis that could be conceived. (Pet. App. 448a-49a).[39]

[39] Other lower courts have recognized that plaintiffs could never meet the onerous burden established by the opinion below. See, e.g., Guardians Association v. Civil Service Commission, 630 F.2d 79, 88 n.7

Judge Phillips stressed, as did this Court in Dothard, that there was no "evidence that the inclusion of other variables would in fact reduce" the disparities in the wages of blacks and whites in the same. (Pet. App. 450a) (Emphasis in original).

Lower courts, all too familiar with the speculative ingenuity of Title VII defendants, have consistently and properly refused to accept such speculation as an adequate response to statistical evidence.

> [U]nquantified, speculative and theoretical objections to the proffered statistics are properly given little weight by the trial court: "When a plaintiff submits accurate statistical data, and a defendant alleges that relevant variables are excluded, defendants may not rely on hypothesis to lessen the probative value of plaintiff's statistical proof. Rather, defendant . . . must either rework plaintiff's statistics

---

(2d Cir. 1980).

> incorporating the omitted factors or present other proof undermining plaintiff's claims."

Trout v. Lehman, 702 F.2d 1044, 1102 (D.C. Cir. 1983), vacated on other grounds sub nom. Lehman v. Trout, 79 L.Ed.2d 732 (1984). These decisions reflect the fact that ordinarily only an employer knows what non-racial factors, if any, might have been the reasons for its actions, and only that employer has control of the evidence which would tend to substantiate or undermine that defense.

The danger of accepting such a speculation defense is well illustrated by the facts of this case. The fourth Circuit concluded there was no salary discrimination primarily because that court thought that black employees might have been earning less simply because they were concentrated in the counties in

western North Carolina that paid all their employees below average salaries. (Pet. App. 388a) But the district court found that blacks were in fact concentrated in the higher salaried counties in the eastern portion of the state. (J. App. 77; Pet. App. 48a, 110a; see C.A. 1612-15). Similarly, although the district court thought it possible that the salary disparities might have been caused by differences in performance ratings, the defendants own analysis showed that in 1975 the lower paid blacks had actually received higher ratings than their better paid white colleagues. (See n.12, supra).

To overcome the presumption created by a prima facie case, a defendant "must clearly set forth, through the introduction of admissible evidence, the reasons for" the disputed action.[40] Texas Dept. of

[40] A defendant may also attack the accuracy

Community Affairs v. Burdine, 450 U.S. 248, 255 (1981). Where that explanation is based on the utilization by the employer of one or more selection criteria, the criteria must, of course, be job-related. Griggs v. Duke Power Co., 401 U.S. 424 (1971). Evidence that a defendant utilizes one or more legitimate non-discriminatory criteria is not by itself sufficient; those asserted criteria could not be the "reasons for" a disputed action unless the application of those criteria would in fact have produced the

---

of the raw data utilized by plaintiffs, or object on technical statistical grounds to the method by which plaintiffs analysed that data. But the mere existence of minor inaccuracies or technical flaws will not dispel the evidentiary value of statistics unless there is substantial reason to believe that the elimination of those alleged errors would have fundamentally altered the outcome of the analysis. Craik v. Minnesota State University Bd.,731 F. 2d 465, 477 n.5 (8th Cir. 1984).

result of which a plaintiff complains. Thus, although an employer does not bear the burden of proving what its actual motive was, the employer's proposed explanation simply is not an explanation of all unless the employer demonstrates that its asserted motive, if present, would have led to the employment action at issue. Turner v. Fouche, 396 U.S. 346, 361 (1970).

In an individual action, for example, a salary disparity could not be rebutted merely by evidence that an employer had a job-related policy of paying higher salaries to workers with Ph.D.'s; the employer would also have to show, of course, that the black complainant actually lacked a Ph.D., and that application of the Ph.D. rule could thus explain

his particular salary level. Similarly, in response to evidence of systematic salary discrimination, an employer does not offer evidence of the "reason for" a disparity merely by proving it uses some non-racial criteria to fix salaries; the employer must also show, by statistical[41] or other methods, that application of those racially neutral criteria to the work-force in question would yield, and thus tend to explain, the salary patterns of which a plaintiff complains.

In the instance case the respondents did not meet, or even attempt to meet, this standard. A defense witness did

---

[41] The lower courts have generally regarded such more refined statistics as the most appropriate and reliable form of rebuttal evidence. Movement for Opportunity v. General Motors, Inc., 622 F.2d 1235, 1245 (7th Cir. 1980) ; Trout v. Lehman, 702 F.2d at 1102; Falcon v. General Telephone Co., 628 F.2d 369, 381 (5th Cir. 1980), rev'd on other grounds, 457 U.S. 147 (1982)

identify several non-racial criteria which respondents asserted affected salaries, but respondents made no effort to satisfy its burden of showing that these criteria were "the reasons for" the apparent salary disparity, since there was simply no evidence that an analysis including those criteria would have explained away the obvious disparities. The strong prima facie case of salary discrimination thus stood essentially unrebutted.

III. TITLE VII AND THE FOURTEENTH AMENDMENT PLACE ON PUBLIC AGENCIES A NON-DELEGABLE DUTY TO PROMOTE EMPLOYEES IN A NONDISCRIMINATORY MANNER

The evidence of discrimination in promotion showed, inter alia, that NCAES never promoted a black into a committee chairmanship for which a white male had applied. (See pp.13-17, supra). The

district court concluded that that evidence "certainly create[d] a prima facie case of discrimination". (Pet. App. 83a). The district court, relying on a somewhat unorthodox form of statistical analysis,[42] held that petitioners had failed to prove the existence of racial discrimination. The court of appeals disagreed

---

[42] Both the district court and the court of appeals insisted in including in their analyses promotion vacancies for which only blacks had applied. (Pet. App. 78a-81a, 417a). Most of the black chairman included in these analyses had won their position by default when no white applied. The selection of a black applicant in such a case is clearly of no evidentiary significance to a claim that an employer discriminates in favor of whites when both blacks and white apply. Except in cases where applicant flow is tainted by discrimination, the proper focus of an analysis of a discrimination should be on vacancies for which both races applied. Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 474 (8th Cir. 1984) (women only selected when no men applied); Williams v. New Orleans Steamship Ass'n, 673 F.2d 742, 753 (5th Cir. 1982) (blacks given desirable assignments only when no whites available.)

with the methodology used by the district court. (Pet. App. 412a-416a) Rather than remand the case for the application of what it believed was the correct standard, however, the court of appeals conducted its own analysis of the record. The fourth circuit concluded that the statistical evidence "completely refuted" the claims of racial discrimination in the promotion of county chairmen. (Pet. App. 423a).

The linchpin of the fourth circuit's decision[43] was its view that both Title VII and the Fourteenth Amendment permit a public employer to delegate away its responsibility to promote its employees in a non-discriminatory manner. The county

---

[43] The fourth circuit's analysis was also flawed by its refusal to focus its analysis on vacancies for which both blacks and whites had applied. See n.42, supra.

chairmen at issue in this case were undeniably NCAES employees. But the court of appeals believed NCAES had immunized itself from any liability for the selection of those employees by choosing, in many cases where blacks and whites both applied, to "recommend" applicants of both races, and to permit the county involved to make the final decision. In every case in which a county was permitted to choose between a black and a white applicant, the county chose the white,[44] a fact of which NCAES could not have been unaware. The fourth circuit held nonetheless that NCAES was "not separately responsible" for the final decisions as to who would be selected as the NCAES county chairman. (Pet. App. 412a). The only action for which NCAES was legally accountable, the

---

[44] Compare chart at Pet. App. 419a et seq. with C. A. App. 1737-42.

appellate court believed, was the recommendations which it made for the vacancies. If, as actually occurred, the counties invariably preferred that NCAES hire only white chairmen, the fourth circuit held that NCAES still had no legal responsibility for that result. Thus the fourth circuit focused its own statistical analysis solely on the number of blacks and whites NCAES recommended for chairmanships, and deliberately disregarded the evidence regarding the identities of the employees who were actually promoted.[45]

---

[45] Petitioners alleged that a variety of discriminatory practices had artificially reduced the number of blacks who applied for promotion to county chairman. The district court found that, prior to 1972, applicants had been individually recruited on a word-of-mouth basis, and that no notice of the existence of vacancies was given to other potentially interested employees. (Pet. App. 24a, 75a, 271a, 294a) Between 1968 and 1971 there were 23 vacancies for which only one applicant, a white, ever applied; this represented 68% of the 34 vacancies filled in those years. See Pet. App. 419a et seq. A number of

The decision below is squarely inconsistent with this Court's decision in Arizona Governing Committee v. Norris, 403 U.S. 1073 (1983). In Norris the plaintiff, a state employee, complained that the retirement plans available to her all discriminated on the basis of sex against female retirees. Arizona denied any legal responsibility for that discrimination, arguing that the state itself had never

---

black employees testified that they were deterred from applying for a county chairmanship because they knew that NCAES had never promoted a black over a white male. C.A. App. 67, 68, 135, 146, 149. See Teamsters v. United States, 431 U.S. 324, 365 (1977). Of the 289 applications for promotion filed from 1968 to 1981, only 31, or 10.7%, were from blacks, although blacks comprised over 25% of the employees eligible for promotion. Even if, as the fourth circuit believed, there was no discrimination in recommendations, the court of appeals erred in failing to address these substantial claims that other discriminatory practices had reduced the number of blacks applying for, and thus receiving appointments as, county chairman.

discriminated, but had merely delegated to a number of private annuity companies the responsibility for developing and offering retirement plans to state employees. Since no state official had engaged in discrimination, Arizona argued, the state had no legal responsibility for discrimination by those third party firms. This Court rejected that contention, holding, in Justice O'Connor's apt phrase, that an employer could not "escape Title VII's mandate by using a third-party" to make its employment decisions. 463 U.S. at 1109 (concurring opinion).

The majority emphasized in Norris that state employees in Arizona were not free to deal with any annuity company of their choice. 463 U.S. at 1086-87. Rather, Arizona itself had specifically selected the firms from which retirement plans could be obtained, and all of those

plans discriminated against women.[46] Here, as in Norris, NCAES specifically selected the officials who were to have a role in filling each particular vacancy. NCAES, not black applicants, decided to refer the disputed promotion decisions to county officials, and NCAES cannot disclaim responsibility for the discriminatory action invariably taken by those officials. Norris reasoned, more broadly, that under Title VII "employers are ultimately responsible for the compensation, terms, conditions, [and] privileges of employment." 463 U.S. at 1089. (Emphasis added). "We do not think it

---

[46] "Having created a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State, the State cannot disclaim responsibility for the discriminatory features of the insurers' options." 463 U.S. at 1089. (Emphasis added).

makes any ... difference ... that the employer engaged third parties to provide a particular benefit rather than directly providing the benefit itself." 463 U.S. at 1089 n.21. The selection of particular individuals for promotion is an even more important "aspect of the relationship between the employer and employees" than the fringe benefits at issue in Norris, 463 U.S. at 1089 n.21.

The purported delegation of promotion decisions provides also no defense to petitioners' constitutional claims, although for somewhat different reasons. A state's responsibility to refrain from involvement in intentional racial discrimination is not limited to cases in which a state officially personally engages in racially motivated conduct; in some instances interrelated activity of a state and third parties constitutes state action

and is thus subject to the requirements of the Fourteenth Amendment. See, e.g., Adickes v. S. H. Kress Co., 398 U.S.144 (1970); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

This Court has repeatedly held that the constitutional prohibition against discrimination extends to all individuals carrying out state functions, regardless of whether those individuals are technically employees of the state. Thus the Fifteenth Amendment, which prohibits a state from denying the right to vote on account of race, also prohibits a state from delegating control of the franchise to discriminatory third parties. In Smith v. Allwright, 321 U.S. 649 (1944), for example, the state of Texas had no statute forbidding blacks from voting, but delegated to each political party authority to decide the qualifications of

participants in party primaries. The Democratic party adopted a rule permitting only whites to vote in party primaries, and the state disavowed any responsibility for that discrimination. This Court disagreed, holding the state electoral system gave to those discriminatory primaries a decisive role in the selection of state officials, and thus "endorse[d], adopt[ed] and enforce[d] the discrimination against Negroes. This is state action." 321 U.S. at 664. The Court reached a similar conclusion when Texas permitted a private all-white organization known as the Jaybirds to conduct primary elections, the victors in which invariably won the succeeding Democratic primary and general election. Terry v. Adams, 345 U.S. 457 (1953).

Just as Texas could not with impunity delegate to third parties effective control over who could vote in state elections, so too North Carolina cannot with impunity delegate to third parties effective control over the selection of state employees. The selection of NCAES county chairmen is inherently a state function, and those selections remain state action, and actions for which NCAES is accountable, regardless of whether the individual clothed with the state power to make that decision is an employee of North Carolina, of a county,or of the infamous Jaybird Party.[47]

---

[47] See Meredith v. Fair, 298 F.2d 696, 701-02 (5th Cir. 1962); Bell v. Georgia Dental Ass'n, 231 F. Supp. 299 (N.D. Ga. 1964); "Perpetuation of Past Discrimination", 96 Harv. L. Rev., 828, 848-53 (1983).

Neither the Title VII nor constitutional claims in this case are controlled by General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982). That decision held that section 1981, which forbids only intentional racial discrimination in employment, does not create a non-delegable duty, and that the contractors in that case could not be held liable merely because they utilized the services of a racially discriminatory union hiring hall. 458 U.S. at 391-97. An essential premise of General Building Contractors was that section 1981 applied only to instances of intentional discrimination.[48] Title VII, on the other hand, forbids as well practices which have a racially discriminatory effect. Griggs

---

[48] "Our earlier holding that § 1981 reaches only intentional discrimination virtually compels this conclusion." 458 U.S. at 396.

v. Duke Power Co., 401 U.S. 424 (1971). The delegation of employment decisions to a discriminatory third party has just such a discriminatory impact. Here counties given a choice between black and white applicants always chose the white; thus NCAES' practice of giving counties a role in that decision had the effect of excluding 100% of all blacks seeking positions for which whites had also applied.

The Fourteenth Amendment, like section 1981, reaches only intentional racial discrimination by a state. But the standards governing what constitutes state action under that Fourteenth Amendment are clearly different than the principles that were applied to a private employer in General Building Contractors. This Court's decisions regarding the scope of state action have consistently and correctly

turned on the unique role of government in American society, and on the peculiar historical interactions of public and private institutions. General Building Contractors, on the other hand, relied on the standards traditionally utilized in ordinary private commercial litigation: respondent superior, the law of agency, and the principles of the National Labor Relations Act. 458 U.S. at 392-94. General Building Contractors did not purport to apply any of this Court's constitutional decisions regarding the scope of state action, and did not intimate any intent to displace those decisions with the quite different rules appropriate in a commercial setting.

For constitutional purposes, moreover, counties are subdivisions of a state, and the conduct of a county official is as much state action as the

activities of the governor. The fourth circuit's apparent assumption that a state could evade its constitutional obligation by balkanizing among a variety of state and local officials responsibility for a particular program was rejected by this Court in Wallace v. United States, 389 U.S. 215 (1967), aff'g Lee v. Macon County, 267 F. Supp. 458 (M.D. Ala. 1966) (joint state and local operation of schools).

NCAES was thus legally responsible for discrimination in the selection of county chairmen, regardless of the extent to which the personnel officials involved were paid by the state or by a county. The fact that NCAES never promoted a black to a position for which a white had applied was clearly sufficient to create a prima facie case of discrimination. The trial court repeatedly noted that many among the

named plaintiffs were well qualified to serve as county chairmen. (Pet. App. 231a, 236a n.76 [sic], 242a, 245a). One unsuccessful black applicant had previously served as an acting county chairman, and several of the rejected black applicants were ultimately named county chairman, although not until they sought a vacancy for which no white male had applied. (Pet. App.243a, 258a, 273a, 275a, 281a, 308a). Under these circumstances petitioners' prima facie case of intentional discrimination stood essentially unrebutted.[49]

---

[49] The trial court recognized that, had it sustained the claim of classwide discrimination, even blacks who were not named plaintiffs "would have been entitled to relief as members of the class." (Pet. App. 218a n.70 [sic]). Similarly, in addressing claims that blacks were deterred from applying, the trial court attached decisive importance to its views that any fears of discrimination were simply groundless. (Pet. App. 99a).

IV. THE COURTS BELOW ERRED IN HOLDING RESPONDENTS HAD NO OBLIGATION TO DISESTABLISH A STATE CREATED SYSTEM OF GOVERNMENT SPONSORED SINGLE RACE 4-H AND EXTENSION HOMEMAKER CLUBS

(1) The History of the Clubs

The essential facts with regard to this issue are not in dispute.[50] Prior to

---

[50] Petitioners included actual and potential members of 4-H and extension homemaker clubs, who contended that NCAES's practices violated their statutory and constitutional rights. Petitioners also included NCAES employees who are required by NCAES to service those single race clubs. If, as petitioners contend, NCAES has unfulfilled legal obligations related to the racial composition of these clubs, then NCAES is requiring petitioners to violate federal law. Continued violation of federal law might conceivably subject petitioners to civil liability. Scheuer v. Rhodes, 416 U.S.232 (1974). That black employees should be required to participate in unlawful discriminatory practices to which they understandably object violates their own rights as well as those of other victims. Abood v. Detroit Board of Education, 431 U.S. 209,232-37 (1977). Under these circumstances the fourth circuit's concerns regarding petitioners' standing were clearly unfounded. See also Craig v. Boren, 429 U.S. 190, 194-96 (1976).

1965 both the 4-H and extension homemaker clubs were operated on a strictly de jure segregated basis.[51] NCAES deliberately organized the clubs on racial lines, and NCAES personnel were assigned to clubs on a strictly racial basis. In 1965 NCAES announced that existing clubs could no longer reject an applicant on the basis of race. But where single-race clubs existed side by side in the same racially mixed community, NCAES took no steps to require or encourage the merger of those clubs. Single race clubs have continued to this day to exist in racially mixed communities throughout the state, and until at least 1974 NCAES continued to assign personnel to those clubs on a racial basis.[52]

---

[51] See Tr. 4201-04; GX 115, p. 4; Pet. App. 37a.

[52] GX 21, 23, 35; C.A. App. 1834.

The only policy adopted by NCAES for dealing with the large number of single race clubs it had created was the freedom of choice plan established in 1965. In March, 1977, NCAES did briefly adopt a directive requiring that a "reasonable effort" be made to integrate new single race clubs;[53] that directive was rescinded a month later, however, because state officials believed NCAES was "essentially 'sheltered' from discrimination issues until the pending litigation is settled" and because "counsel advised that a court order resulting from the civil rights suit would likely require steps in addition to any affirmative action measures then being implemented."[54] In 1979 NCAES acknowledged

---

[53] C.A. App. 1839; see also J. App. 135-36 (rescinded 1974 initiative).

[54] J. App. 142; C.A. App. 1845-46; see also J. App. 97-98.

that its past approach had been unsuccessful, and once more adopted a proposal to require "all reasonable efforts" to integrate the clubs.[55] Again, however, that measure was rescinded at the request of the attorney representing NCAES in the instant litigation,[56] who explained that any such steps would undermine his contention at trial that no affirmative measures could successfully integrate the clubs.[57] In sum, NCAES has refused to take any steps beyond freedom of choice, not because it believed freedom of choice had been successful or because NCAES concluded there were no workable alternatives, but solely because NCAES' attorney repeatedly advised the agency that any successful

---

[55] J. App. 147-50; C.A. App. 1850, 1855, 1959-62.

[56] Tr. 4284.

[57] J. App. 157-58; C.A. App. 1904.

efforts to integrate the clubs would undermine its position in the instant litigation.

The impact of the freedom of choice plan was accurately described by Judge Phillips as "minimal." (Pet. App. 471a). In 1965, prior to the adoption of the freedom of choice plan, there were 1,474 all-white 4-H clubs; in 1980, after 15 years of freedom of choice, there were 1,348 all-white clubs.[58] Between 1972 and 1980 the number of single race clubs in racially mixed communities declined by less than 2%.[59] In the last year for which NCAES kept statistics, 98.8% of all the extension homemaker clubs were either all-white or all-black.[60] The NCAES

---

[58] C.A. App. 1806; GX 11; Pet. App. 472a.

[59] C.A. App. 1807, 1813; Pet. App. 472.

[60] C.A. App. 1797-1805; J. App. 103. NCAES did not contend below that the degree of integration of these clubs has increased

director testified that under that agency's present policies it would take "forever" to eliminate all the single race clubs.[61]

The number of single race clubs is not solely the result of the pre-1965 de jure system. Since 1965 a substantial number of new single race clubs have been organized in racially mixed communities. As Judge Phillips observed, "[t]hat chance alone could account for their single race composition is not suggested by anyone." (Pet. App. 476a). NCAES acknowledged that the racial makeup "is determined by the local volunteer" who organizes the club.[62] NCAES officials declined to interfere with organizing along racial lines because they

---

since it stopped collecting detailed statistics.

[61] Tr. 1165-66.

[62] Deposition of January 30, 1973, p. 74.

believed such recruiting increased total membership. The director of the 4-H program asserted that if the single-race clubs were merged, and individuals were thus denied the opportunity to join an all-white or all-black club, many members of the public would refuse to join the clubs or serve as volunteer leaders.[63] If, as the director testified, many volunteer organizers simply would have refused to participate in integrated clubs, it is of course inconceivable that those white organizers would have actually recruited black members.

(2) The Applicable Legal Requirements

Both courts below believed that NCAES had no legal and constitutional obligation other than to assure that no

---

[63] Tr. 4997-99, 5121-22; see also J. App. 99.

applicant was rejected for membership in a club because of his or her race. (Pet. App. 158a-63a, 165a-85a, 424a n.128). Petitioners do not contend that applicants have been rejected on a racial basis since 1965. Because of their view of the law, neither the district court nor the court of appeals found it necessary to decide whether, as petitioner claimed, there had been intentional racial discrimination in recruiting, or to consider whether NCAES had actually made any progress in dismantling the de jure system it created prior to 1965.

This case can readily be resolved on a non-constitutional basis. See Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). The applicable Agriculture Department Title VI regulations clearly require NCAES to take effective measures

to disestablish the pre-1965 de jure system. 7 C.F.R. § 15.3(b)(6)(i) provides:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race ... the recipient must take affirmative action to overcome the effects of prior discrimination.

Section 15.3(b)(6)(i) clearly obligates NCAES to do more than adopt a freedom of choice plan that fails. Although petitioners expressly relied on section 15.3(b)(6)(i) in the proceedings below, as did Judge Phillips (Pet. App. 474a), the fourth circuit majority inexplicably failed to address the issues raised by this regulation. (See Pet. App.424a n.128).

In addition, intentional racial discrimination in the recruiting of participants in a federally assisted program violates the express commands of

Title VI itself. Where organizers recruit only whites to join a state supported 4-H or extension homemaker club, while deliberately refusing to recruit blacks, blacks are clearly not afforded the same opportunity as whites to join those clubs or to benefit from the federally assisted programs those clubs provide. As Judge Phillips noted, the district court failed to address the issues raised by the evidence of discriminatory recruitment. (Pet. App. 475a-79a)

Were this Court to reach the constitutional issues presented by this case, the result would be controlled by Green v. School Board of New Kent County, 391 U.S. 430 (1968). Green held that freedom of choice plans were only acceptable if they in fact disestablished the de jure system that the state had created: "The burden on a school board today is to come forward

with a plan ... which promise[s] realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools". 391 U.S. at 437. Since NCAES itself created the original de jure segregated club system, NCAES was under the same affirmative obligation as the school board in Green to adopt a remedy that would effectively disestablish that system. During the last two decades NCAES' freedom of choice plan has proved as unsuccessful as the freedom of choice plan in Green itself. The number of all-black and all-white clubs supported by NCAES today is virtually identical to the number that existed in the heyday of de jure segregation. Under these circumstances Green clearly requires that NCAES do more.

A finding of liability by this Court will not, as the district court seems to have feared, require precipitous or destructive judicial action. The fashioning of a remedy for this problem will require considerable care and cooperation among all parties. It may be necessary to explore a variety of remedial devices before the best approach can be found. But surely, a third of a century after Brown, and 22 years after the adoption of Title VI, the time has come to at least begin the process of changing "black" and "white" state supported clubs into just clubs.

V. THE LOWER COURTS ERRED IN REFUSING TO CERTIFY THIS CASE AS A CLASS ACTION

Petitioners moved prior to trial for an order certifying this case as a class action. Petitioners requested that the

district court certify three distinct classes: (1) a plaintiff class of all black NCAES employees, (2) a plaintiff class of all black members and potential members of 4-H and extension homemaker clubs, and (3) a defendant class consisting of the 100 counties that jointly operated the extension service programs with NCAES. The district court concluded that certification was improper as a matter of law;[64] in the fourth circuit the majority opinion declined to uphold the district judge's reasoning (Pet. App. 372a-73a), and Judge Phillips urged at length that the lower court opinion was incorrect. (Pet. App. 426a-433a). A majority of the fourth circuit also concluded, however, for reasons somewhat

---

[64] Pet. App. 33a-48a; J. App. 78.

different than those of the district court, that certification was improper. (Pet. App. 365a-78a).

The trial court held that class certification was never permissible in a Title VII action if the EEOC or United States had also filed a pattern and practice suit; the trial judge believed this prohibition was established by General Telephone Co. v. EEOC, 446 U.S. 318 (1980). (Pet. App. 45a-46a). As Judge Phillips correctly noted, the trial court's decision literally stood General Telephone on its head. (Pet. App. 432-33a). General Telephone refused to require in pattern and practice actions that the government be certified as a representative of class of alleged victims. This Court reasoned that, if that were done, the result of the government litigation would be binding on all

affected discriminatees, and would thus preclude them from bringing on their own an individual or class action. Such a result would be inconsistent with the intent of Congress to create parallel and overlapping remedies against discrimination. 446 U.S. at 333. The effect of the district court decision here led to precisely the result condemned in General Telephone, converting the mere existence of a government pattern and practice suit into a bar to any private class action, and requiring potential class members to look only to the government, not to any private action, for relief.

The trial judge also believed that controlling fourth circuit precedent absolutely precluded certificaton of a class that included employees who worked at different locations. (Pet. App. 43a-44a) As Judge Phillips explained at

length, neither previous fourth circuit decisions nor Rule 23 establish any per se rule precluding certification of a class merely because employees may work at different facilities. (Pet. App. 427a-432a). The fact that potential class members are employed at different plants is no more decisive than the fact that they work on different floors in the same building, or that they were subjected to discrimination on different dates. The same Rule 23 requirements apply, and could in fact be satisfied, regardless of whether the alleged discrimination may have occurred at a variety of locations or on a variety of dates. Of course, to be encompassed in a single class action two workers must have more in common than employment by the same institution; but where common questions of law or fact exist, and the other Rule 23 requirements

are met, it is of no independent significance whether those employees work at opposite sides of a room or at opposite ends of a state.

Although the district court did not clearly explain its refusal to certify the class of actual and potential club members, that decision appears rooted in the trial court's views of the merits of the clubs issue. The district court asserted that the club plaintiffs "presumably" sought to lead "a class of black[s] allegedly denied membership in all white ... clubs" (Pet. App. 40a). Finding no evidence that club applicants had actually been rejected on the basis of race, the trial court concluded that neither the plaintiffs nor anyone else was a member of the proposed class. But the legal claim adduced by the club plaintiffs was that, as a result of allegedly unlawful prac-

tices by NCAES, those plaintiffs and the proposed club-related class had as a practical matter been denied any opportunity to join multiracial 4-H and extension homemaker clubs. Certification was obviously appropriate to decide the common legal questions presented with regard to the legality of those disputed practices.

The fourth circuit majority believed that a party seeking certification was obligated to demonstrate the existence of a "legally cognizable wrong" affecting the class. (Pet. App. 372a). This case, of course, presents a variety of disputed class-wide practices, but the court of appeals, after considering the legality of each of those practices, concluded on the merits that the disputed practices were lawful, and thus involved no "legally cognizable wrong." Petitioners alleged a

class-wide practice of perpetuating pre-1965 intentional wage discrimination; the fourth circuit denied certification as to that issue because it believed the practice to be lawful. (Pet. App. 369a, 380a-82a). Petitioners alleged that the state had a nondelegable duty to select County Chairmen on a racially neutral basis; the fourth circuit denied certifications as to that issue because it believed there was no such duty. (Pet. App. 369a-70a). Petitioners alleged that the continued operation of several thousand single-race 4-H and extension homemaker clubs violated both the Constitution and federal law; certification was denied on the ground that the fourth circuit believed the operation of those clubs to be entirely legal. (Pet. App. 370a-71a).

The fourth circuit inexplicably assumed that class certification was not proper until and unless a court had held that the proposed class claims were meritorious. But the language of Rule 23 establishes no such requirement. On the contrary, certification is appropriate when there is a dispute regarding whether a defendant has engaged in a legally cognizable class-wide wrong. The resolution of that dispute should precede, not follow, class certification. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974). Rule 23 is available for the litigation of common issues of law as well as common issues of fact. The decision below that there were no "legally cognizable wrongs" constitutes, not a finding that there were no common issues of fact and law, but an adverse resolution of

those very common issues. Eisen forbids denial of class certification on such a basis.

The issues of law addressed by the fourth circuit, and presented in this Court, were common as well to the proposed defendant class of counties. The practices described in parts I-IV of this brief were carried on statewide; there is no suggestion, for example, that the effects of pre-1965 salary discrimination were eliminated in that year in some counties although not others. The counties were jointly and severally liable for these statewide practices. The district court found that the operation of each extension service office was a "partnership" between NCAES and the county (J. App. 77, 161), that the workers in each office were "joint employees" of NCAES and the county (J. App.77, 161), and that NCAES and each

county"jointly" determined the promotions and salaries in each office as well as the county's contribution to those salaries. (J. App. 77, 162, 163; Pet. App. 21a, 24a, 77a, 122a). The officials who engaged in discrimination in the conduct of that joint enterprise within a given county acted with the authority of both NCAES and the county, and both entities are legally accountable for that unlawful conduct. The circumstances of this case are substantially the same as those in the defendant class action upheld by this Court in Lee v. Washington, 390 U.S. 333 (1968), aff'g Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966).

This certification issue remains of continuing importance. The United States no longer presses all of the issues which all plaintiffs raised at trial and which petitioners still pursue in this Court.

The Department of Justice has an avowed policy of declining to seek certain forms of affirmative injunctive relief frequently sought by private plaintiffs. The limitations period applicable to the governments claim in this case may be different than that which applies to the private class action. Thus a denial of certification would, as a practical matter, prevent at least some class members from receiving relief to which they would otherwise be legally entitled.

CONCLUSION

For the above reasons the decision of the court of appeals should be reversed.

Respectfully submitted,

J. LeVONNE CHAMBERS
RONALD L. ELLIS
ERIC SCHNAPPER*
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Petitioners

*Counsel of Record

APPENDIX

STATUTES, REGULATIONS, AND CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment provides, in pertinent part, "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."

Section 601 of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer --

> (1) to fail or refuse to hire ... any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex,. or national origin....

Section 706(e) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(e), provides in pertinent part:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred....

The Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill,

> effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of an employee.

Section 15.3(b)(6)(1), 7 C.F.R., provides in pertinent part:

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race ... the recipient must take affirmative action to overcome the effects of prior discrimination.